SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 77

JOHN HOLLAND, *et al.*,

Petitioners,

v.

THE LUCAS COUNTY BOARD OF ELECTIONS, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners pray that a writ of certiorari issue to review the ruling of the Supreme Court of the State of Ohio entered in the above-entitled cause on February 7, 1968.

Decisions Below

The rulings of the Supreme Court of the State of Ohio denying petitioners' motion for leave to appeal, dismissing the petitioners' appeal, and mandating the carrying out of the lower court's judgment, are appended hereto as Appendices A, B, and C. The memorandum decision of the Court of Common Pleas of Lucas County, Ohio, is appended hereto as Appendix D.

Jurisdiction

The rulings of the Supreme Court of the State of Ohio were entered on February 7, 1968. Jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1257(3).

Statutes Involved

Ordinance No. 168-67 and Sections 5, 43, 75-100 of the Charter of the City of Toledo, Ohio, are set forth in Appendices E and G.

Questions Presented

1. Does a city wide referendum, nullifying an existing city fair housing ordinance, and which has the effect under provisions of the City Charter of requiring the approval of the majority of the electorate before future fair housing laws may be enacted, deprive Negro petitioners, who seek to eliminate racial discriminatory housing practices, of equal protection of the laws as guaranteed by the Fourteenth Amendment?

2. Does a state deny Fourteenth Amendment rights when it permits governmental power to protect against private housing discrimination to be so limited and conditioned as to require the approval of the city electorate to secure such protection?

3. Does the requirement that the approval of the majority of the city electorate be obtained on all ordinances prohibiting racially discriminatory housing practices, when no other type of legislation must meet this requirement, constitute an invidious racial classification within the meaning of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

Statement

The facts in this matter are clear and uncomplicated. On March 20, 1967, the City Council of Toledo, Ohio, enacted fair housing legislation known as Ordinance No. 168-67 (Appendix E). The ordinance was enacted under the city's power to pass emergency legislation (Toledo City

Charter, Section 43) and prohibited discriminatory housing practices based on race, color, religion, or national origin in the sale, rental, lease or occupancy of real property in the City of Toledo. The ordinance created enforcement machinery and provided that violators of the act could be convicted of a misdemeanor.

The City Charter of Toledo provides procedures for initiative and referendum by the electorate. (Excerpts from the City Charter are appended in Appendix G.) Section 81 of the Charter, provides that ordinances passed by the city shall be subject to the approval of the electorate if at any time within 30 days after enactment of ordinance a petition is submitted for referendum to the Council and is signed by electors in equal number "to at least fifteen percent of the total number of ballots cast for councilmen at the proceeding election. . . ." Three days after the enactment of the fair housing ordinance (No. 168-67) such a petition was filed with the Clerk of the City Council for approval as to form. The petition form was approved and on April 18, 1967, some 792 referendum petitions were filed with the Council containing 30,327 signatures. The Clerk verified 17,466 of these signatures—a sum sufficient to meet the fifteen percent requirement—and on April 19, 1967, the Lucas County Board of Elections was notified of the need for a referendum election. The referendum itself merely called upon the voters to state whether they approved or disapproved of the fair housing ordinance (Appendix F). The matter was included on the ballot of the September 12, 1967 general primary election. On September 18, 1967 the Board of Elections certified to the Secretary of State of Ohio that 54,518 persons voted to repeal the ordinance while only 22,827 voted to retain the ordinance.

Section 86 of the City Charter provides that, "After the people have legislated for themselves, either by initiating legislation or passing favorably or unfavorably upon

legislation referred to them by any body, their action is final and shall not be subject to amendment or repeal, without a general vote of the people of Toledo on same." The effect of the referendum, therefore, was to remove the question of fair housing practices from the jurisdiction of the City Council and place control over this matter in the hands of the majority of the electorate.

Pursuant to Section 3515.08 of the Ohio Revised Code, the petitioners—Negro residents of Toledo—filed a petition contesting the referendum on state procedural and substantive grounds and on the grounds that the nullification of the ordinance constituted a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The cause was submitted to the Court of Common Pleas for Lucas County, Ohio on the pleadings, stipulations and an agreed statement of facts. The court held that the petition was "not well taken" and dismissed the petition. It ruled in a memorandum opinion (Appendix D) that the Charter provisions expressly reserving to the people of Toledo the right of a referendum vote on city ordinances was valid and not repugnant to the United States Constitution.

Pursuant to chapter 3515.15 of the Ohio Revised Code, the petitioners appealed directly to the Ohio Supreme Court. On February 7, 1968, the Supreme Court denied the petitioners' motion for leave to appeal, dismissed the appeal "for the reason that no substantial constitutional question exist herein", and ordered execution of the lower court judgment.

Petitioners thereupon bring the cause here.

Reasons for Allowance of the Writ

1. The holding below is contrary to the decisions of this Court. *Reitman* v. *Mulkey,* 387 U.S. 369. The vice of the referendum which negated Toledo's fair housing law rests in the fact that it affirmatively promotes, supports and sanctions racial discrimination in the sale and rental of real property. This Court consistently has held that state involvement to any significant degree in the support, maintenance or promotion of racial discrimination violates the Fourteenth Amendment to the Constitution of the United States and cannot stand. See *e.g., Burton* v. *Wilmington Parking Authority,* 365 U.S. 715; *Anderson* v. *Martin,* 375 U.S. 399; *Robinson* v. *Florida,* 378 U.S. 153; *Evans* v. *Newton,* 382 U.S. 296; *Griffin* v. *Maryland,* 378 U.S. 130; *Shelley* v. *Kraemer,* 334 U.S. 1; *Reitman* v. *Mulkey, supra.*

State authorization to discriminate is as fatally defective as if the state itself imposed the discrimination. See *e.g., McCabe* v. *Atchinson T. & S.F. Ry.,* 325 U.S. 151; *Shelley* v. *Kraemer, supra; Burton* v. *Wilmington Parking Authority, supra.* By shielding those who would discriminate in the sale and rental of real property behind the stated policy of the city as expressed through referendum and perpetuating that policy in the statutory framework involved herein, the City of Toledo unconstitutionally involved itself in private discrimination. In effect, the official policy and law of the city not only authorizes discrimination, but promotes such activity.

In *Reitman* v. *Mulkey, supra,* this court declared that Article I, Section 26 of the California Constitution violated the 14th amendment. The provisions had been adopted by a majority of California voters in the noted Proposition 14 vote in the November 3, 1964 general election. Article I, Section 26 prohibited the State or its subdivision from limiting the right of any person, who so desired to sell, lease or rent real property to any "person

or persons as he, in his absolute discretion, chooses." This Court ruled that Article I, Section 26 was unconstitutional because it involved the state in invidious discrimination since the provision was not only intended to authorize and did authorize discrimination in housing, but the right to discriminate became a basic policy of the state and the provision significantly encouraged and involved the state in acts of private discrimination. The issues in the instant case, while not identical to those in *Reitman* v. *Mulkey,* are substantially the same and the constitutional question is controlled by the holding in that decision.

In *Reitman* the Court emphasized that Proposition 14 did not merely repeal California's fair housing statutes. Private discriminators "enjoyed a far different status" than before enactment of the fair housing statutes and the right to racial discrimination was "immune from legislative, executive, or judicial regulation at any level of the state government." 387 U.S. at 377.

As in *Reitman,* fair housing legislation in Toledo was not merely repealed by the referendum action. Although no provision was written into the Toledo Charter prohibiting fair housing legislation, the effect for all practical purposes was the same. Section 86 of the Charter provides that in the event that the people nullify an ordinance by referendum, their action is final and is not subject to repeal or amendment without the approval of the people. Thus, whereas prior to the enactment of the fair housing ordinance, Negro citizens—the major beneficiaries of fair housing legislation—and other fair housing advocates had only to prevail upon a majority of the Council to obtain such legislation, after the referendum, the situation differed significantly.

In order to enact fair housing legislation in Toledo today, it is necessary that the matter be presented to the people for consideration so as to satisfy Section 86 requirements. The Charter itself does not specify the procedure

for complying with the section, but there are several means by which voter approval could be obtained. If the Council were so inclined, it could enact a fair housing ordinance and submit the legislation to the people for consideration.[1] The Charter also provides for voter initiated legislation [2] and for referendum.[3] Under both of these procedures voter approval of legislation may be secured. In addition, the Section 86 obstacle to fair housing legislation could be

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[1] The Charter does not specify this particular procedure, but the power of the Council to submit legislative proposals to the voters is implied in several sections of the Charter. Such power also is implied by section 86 itself.

[2] The procedures for initiative are set forth in Sections 75-78 of the Charter. To initiate legislation a proposed ordinance must be submitted to the Council in the form of a petition signed by 20 percent of the electorate. If the Council fails to adopt the legislation the matter is to be submitted to a vote of the people. Thus, should fair housing legislature now be proposed through the initiative procedure and the Council rejects the proposal, the question automatically would go to the people. Voter approval would satisfy the Section 86 requirement. On the other hand, should the Council adopt the initiated ordinance, the Section 86 requirement will not have been met as voter approval will not have been secured. (Under normal circumstances, Council adoption of an initiated ordinance would result in its implementation.) Presumably, the Council on its own initiative would then submit the legislation to the voters in order to secure implementation of legislation it favors. If for some reason the Council should fail to take this action, those who initiated the legislation could turn to the referendum procedure. See note 3 *infra*.

[3] Section 81 establishes the procedure for a referendum. Every ordinance passed by the Council is subject to referendum if within 30 days of its enactment a petition containing the signatures of at least 15 percent of the electorate is filed with the Clerk of the Council requesting that the ordinance be submitted to the people for approval. Generally, the referendum procedure is designed to enable the people to challenge legislation, and probably is inapplicable to the instant case since the Council itself could submit any fair housing legislation it enacts to the people. However, should the Council pass such legislation and not submit it to the people, fair housing advocates could use Section 81 provisions to force a vote of the electorate.

overcome by amending the City Charter to authorize the Council to enact a fair housing law or by writing fair housing provisions into the Charter itself.[4]

Each of these procedures would involve holding a city-wide election. This requirement necessarily imposes an additional burden of time delays upon fair housing advocates. Under the initiative procedures, for example, it could take up to six months before such an election is held. With respect to the procedures to amend the City Charter, there could be a four month delay before the proposed amendment is submitted to the electorate. Delays in considering fair housing legislation are particularly harmful because such legislation is always controversial and the delay enables forces hostile to the legislation to develop counter-pressures. Such pressures may be imposed on City Council to retract its proposal or the pressure may be in the form of massive appeals to the electorate to withhold its approval.

Aside from the time delays, several of the procedures for securing voter approval involve the added burden of preparing petitions and gathering thousands of signatures of electors. This is true for the initiative and referendum procedures, as well as for one of the two methods by which the Charter may be amended. Where petitions are necessary, they require signatures ranging in number from 10 to 20 percent of the electorate. The second method of amending the Charter, although not requiring a petition, does involve convincing two-thirds of the Council membership of the merits of fair housing legislation.

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[4] Section 5 of the Charter sets forth two procedures by which the Charter may be amended (Appendix G). An amendment resolution adopted by the Council, in which two-thirds of the members concur, is to be submitted to the voters for approval. Also, a proposed amendment as set forth in a petition signed by 10 percent of the electorate will be submitted to the voters for approval.

Most significant, however, is the fact that no matter which procedure is utilized to overcome Section 86, in the end a majority of the electorate must indicate its approval of fair housing legislation. The final test for fair housing proposals in Toledo always will be to convince white citizens of the merits of such a law.[5] Once having moved the question of fair housing legislation from the legislative councils to the scrutiny and hopeful approval of the white electorate, however, the matter then faces not only the wall of pervasive racial prejudice, but the whole spectrum of irrational elements involving economics, social status, public services, etc., and which are determinative in any popular consideration of open occupancy. It simply is unrealistic to assume that the victims of housing discrimination could prevail upon enough white electors or upon enough Council members to turn the machinery necessary under the initiative, referendum or amendment procedures of the Charter; their numbers simply are not great enough. See Black, "The Supreme Court, 1966 Term, Foreword, 'State Action,' Equal Protection and California Proposition 14," 81 *Harv. L. Rev.* 69, 82 (1967).

Thus, the laws of the state have been utilized to erect a shield protecting discrimination in the sale and rental of housing. A barrier has been created against legislative remedy for discriminatory housing practices and it is unlikely that that barrier can be overcome. As such the state has not remained neutral in the matter, but has placed the machinery of government on the side of private racism. Further, by so limiting its authority to protect against housing discrimination, the state in effect promotes and encourages acts of discrimination and has become a

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[5] As is the case in most American cities, blacks constitute a minority of the population of Toledo. According to the 1960 Census, of the 318,003 persons residing in Toledo, 40,423 or 12.7 percent were non-white. Department of Commerce, Bureau of the Census, U.S. Census of Population, 1960, Vol. I.

participant in discrimination. See *Burton* v. *Wilmington Parking Authority, supra.* The result of the Toledo referendum has been that official approval and sanction of segregated housing patterns has been granted and has become city policy. What clearly has been condemned by this Court—state sanctioned geographical segregation—has been accomplished by indirection. *Buchanan* v. *Warley,* 254 U.S. 60; *Harman* v. *Tyler,* 273 U.S. 668; *Richmond* v. *Deans,* 281 U.S. 704; *Shelley* v. *Kraemer, supra; Barrows* v. *Jackson,* 345 U.S. 249. Nor does it matter that the Toledo referendum represents the will of the majority. Where majority rule deprives minority groups of rights guaranteed under the Fourteenth Amendment, it may not prevail. See *Takahashi* v. *Fish and Game Commission,* 334 U.S. 410; *Yick Wo* v. *Hopkins,* 118 U.S. 356.

The rulings below therefore are inconsistent with the doctrine of *Reitman* v. *Mulkey, supra,* and numerous other decisions of this Court.

2. Under the decisions of this Court the City of Toledo is maintaining an invidious racial legislative classification within the meaning of the equal protection clause of the Fourteenth Amendment. *Loving* v. *Virginia,* 388 U.S. 1; *McLaughlin* v. *Florida,* 379 U.S. 184.

Petitioners know of no category of legislation that may be enacted by the Toledo City Council, other than that of legislation designed to correct racially discriminatory housing practices, which must prior to its implementation withstand the test of voter approval. All other classifications of legislation may be enacted and implemented without such approval. Regulation of discriminatory housing practices thus exists as a distinct and unique category of legislation in Toledo.

A govermental body may make legislative classifications in the exercise of its powers, provided the classifications are reasonably related to the public welfare and all

within the classes are treated equally. *Barbier* v. *Connolly,* 113 U.S. 27. The legislative classification must be based, however, upon a substantial difference pertinent to a valid legislative objective. See *American Sugar Refining Co.* v. *Louisiana,* 179 U.S. 89, 92; *Lindsley* v. *National Carbonic Gas Company,* 220 U.S. 61, 78-79; *Marchant* v. *Pennsylvania R. Co.,* 153 U.S. 380, 390; *Truax* v. *Raich,* 239 U.S. 33; *Skinner* v. *Oklahoma,* 316 U.S. 535; *Hernandez* v. *Texas,* 347 U.S. 475, 478; *Douglas* v. *California,* 372 U.S. 353, 356-357.

Racial classifications are, however, in a unique category. The reason for this can be attributed in part to the fact that in enacting the Fourteenth Amendment Congress was concerned primarily with securing political and civil rights for Negroes, see *The Slaughter-House Cases,* 16 Wall 36; *Strauder* v. *West Virginia,* 100 U.S. 303, in part because racial classifications are "immediately suspect," *Korematsu* v. *United States,* 323 U.S. 214, 216, and in part because racial distinctions simply are "odious to a free people whose institutions are founded upon the doctrine of equality". *Hirabayashi* v. *United States,* 320 U.S. 81, 100. Legislation which establishes racial classifications therefore generally have been struck down. See *Yick Wo* v. *Hopkins, supra; Buchanan* v. *Warley, supra; Oyama* v. *California,* 332 U.S. 633; *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637; *Brown* v. *Board of Education,* 347 U.S. 483; *Anderson* v. *Martin, supra*; *Virginia Board of Elections* v. *Hamm,* 379 U.S. 19; *McLaughlin* v. *Florida, supra; Loving* v. *Virginia, supra.* But see *Korematsu* v. *United States, supra.* Those attempting to justify a law drawn according to race face an extremely heavy burden and must be able to establish that the legislation is "necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which was the object of the Fourteenth Amendment to eliminate." *Loving* v. *Virginia,* 388 U.S. at 11. See also *McLaughlin* v. *Florida, supra.*

The classification of legislation in the instant case clearly is racial since it deals with the matter of discrimination based on race and color in the field of housing. This category of legislation was created out of the desire to eliminate fair housing regulations from Toledo's laws. The only conceivable purpose for the rule is to impose obstacles to the enactment of future fair housing ordinances and assure that no such legislation ever be reinstituted. Such a justification certainly is inadequate to sustain a racial classification which is to be tested by the strict requirements set down by this Court. The Toledo referendum which created this impermissible classification therefore cannot stand.

3. The question involved is of great public importance. Discrimination in the sale and rental of real property constitutes a major problem confronting Negroes in this country. This fact is as true in Ohio as it is throughout the nation.[6] The Ohio Civil Rights Commission which studied the problem of housing discrimination in its state found that the massive migration of Negroes to Ohio's urban areas that has occurred since 1940 has been coupled with pervasive racial discrimination in the sale and rental of housing. Discrimination has contributed significantly to the creation and expansion of black ghettos within the major urban areas of Ohio, including Toledo.[7] The Ohio Commission also found that the establishment of racial ghettos imposed extremely high cost both upon the public generally and private individuals. The Commission stated that "segregated residential patterns . . . typically cause overcrowding require addition expenditures for education, police and fire protection, and health and welfare services."[8] The Commission pointed out that discrimination

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[6] Ohio Civil Rights Commission, *A Survey of Discrimination in Housing,* (Columbus, Ohio, 1964).

[7] Id. at 16, 20.

[8] Id. at 36.

reduced the number of homes available to Negroes and increased the cost of these homes.[9]

The Ohio Commission's findings as to the disadvantages attending housing discrimination are supported by numerous studies which have considered the impact of ghetto residency upon black citizens. It no longer may be contested that housing discrimination and its resultant effect in the maintenance of black ghettos, imposes severe disadvantages upon the ghetto dweller in the areas of education, employment, recreation, police protection, garbage collection, adequacy of housing, public transportation facilities —and the list could continue.[10]

No doubt Congress was motivated in part by a desire to correct the disadvantages which flow from ghetto residency by including provisions for fair housing in the civil rights-riot control legislation enacted in 1968. Public Law No. 90-284, Title VIII, 90th Cong. April 11, 1968.

The Toledo City Council was similarly motivated when it passed its emergency fair housing ordinance. In the declarations justifying the enactment of the measure, the costs involved in racial exclusionary housing practices were explicitly noted. The ordinance declared that racial discrimination in housing constituted a threat to the public health, safety and welfare and "adversely affects the continued

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[9] Id. at 37-38.

[10] See, e.g., U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* (1967) at 20-25. See, generally, U.S. Commission on Civil Rights, *A Time to Listen . . . A Time to Act* (1967); McEntire, *Residence and Race (Final and Comprehensive Report to the Commission on Race and Housing)* (1960); Abrams, *The City Is the Frontier* (1965); K. Clark, *Dark Ghetto* (19655); Kain, "Housing Segregation, Negro Employment and Metropolitan Decentralization," *Harvard University Program on Regional and Urban Economics, Discussion Paper No. 14,* July, 1967; Kain, "The Big Cities' Big Problem," *Challenge,* Sept./Oct. 1966; Drake, "The Social and Economic Status of the Negro in the United States," *Daedalus,* Winter 1965, at 771-814.

redevelopment, renewal, growth and progress of the City of Toledo and its citizens, businesses, industries, and cultural and educational institutions."

What has occurred in Toledo, however, is that the responsibility for determining whether these problems are to be corrected in part through passage of fair housing statutes, has been removed from the jurisdiction of the legislative councils and placed in the control of the primarily white electorate. The result of this transfer of power can only be to foreclose the possibility of this remedy for the deprivations ghetto life imposes upon its residents. The pervasiveness of racial prejudice in this country and the irrational fears whites maintain concerning integrated housing, eliminate any hope that whites will be amenable to fair housing statutes.

The phenomenon of white prejudice has been emphasized in several recent studies by federal agencies. The National Advisory Commission on Civil Disorder stated, "White racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II."[11] A vital aspect of white racial attitudes, the Commission noted, was enforced confinement of blacks to segregated housing.[12] The United States Commission on Civil Rights in a report on the urban racial problem concluded that the practices of both public officials and private individuals contributed to the maintenance and the perpetuation of black ghettos. The report emphasized, however, that:

> Underlying these private and public actions have been attitudes within the white majority—attitudes based on fear, or racial prejudice and on a desire for status. While many of these attitudes are not

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[11] *Report of the National Advisory Commission on Civil Disorders*, March 1, 1968, p. 91.

[12] *Ibid.*

> overtly expressed, they are nonetheless real and effective. They have been accompanied by a lack of concern for and a failure to become involved in the problems of the slums.[13]

Other studies confirm these findings. A survey of attitudes conducted in 1967 among white citizens in the Chicago area established that 60 percent of the whites interviewed "mostly agree" with the proposition that, "White people have a right to keep Negroes out of their neighborhoods if they want to and Negroes should respect this right."[14] The study further established that the issue of open occupancy caused 40 percent of the whites sampled to shift from a pro-civil rights position to an anti-civil rights position. In another survey of racial attitudes, this conducted at the request of the United States Commission on Civil Rights, sampling of white citizens established that racial separation strongly tends to harden and perpetuate white hostility to proposals for fair housing legislation.[15] Finally, the Ohio Civil Rights Commission in its study of housing reached a similar conclusion. It found that, "Whereas the *act* of discriminating or segregating is the result of prejudicial attitudes, these same attitudes are

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[13] U.S. Commission on Civil Rights, *A Time to Listen . . . A Time to Act* (1967), p. 91.

[14] *Militancy for and against Civil Rights and Integration in Chicago: Summer 1967,* Research Report prepared by Inter-University Social Research Community—Chicago Metropolitan Area, Report No. 1, Published by Community and Family Study Center, University of Chicago, August 1, 1967. The white communities sampled were upper middle class and may have been somewhat more liberal in attitude than white working class areas not included in the sample.

[15] The survey was conducted for the Commission by the National Opinion Research Center of the University of Chicago during the summer of 1966. The findings are set forth in U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools,* Vol. II, appendices (1967), pp. 211-241.

reinforced and at times fostered, by . . . segregation".[16] As urban residential segregation becomes more and more intense,[17] interracial contacts necessary to overcome racial prejudice also become less frequent.

When proposed housing integration is attended on the part of whites by fear of economic loss,[18] fear of neighborhood deterioration,[19] and fear of loss of social prestige,[20] and when these deterrents are superimposed upon underlying racial prejudices, it is readily understood why it is impossible to obtain white support for fair housing legislation. This case therefore involves a question of major public importance because it presents the issue whether conditions may be placed upon the implementation of fair housing laws—primary vehicles for eliminating racial ghettoization and its causes—which effectively exclude these laws as possible remedial tools.

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[16] "A Survey in Discrimination in Housing", *supra* note 6, at p. 36.

[17] See Taeuber and Taeuber, *Negroes in Cities*, pp. 28-68 (1965).

[18] See Grier and Grier, "Equality and Beyond: Housing Segregation in the Great Society", *Daedalus*, Winter 1966, at 77-106.

[19] See Kain and Persky, *Alternatives to the Gilded Ghetto*, Harvard University Program on Regional and Urban Economics. Discussion Paper No. 21, Sept. 1967, at 3.

[20] See Wolf, "The Invasion-Succession Sequence as a Self-Fulfilling Prophecy", 13 *Journal of Social Issues*, No. 4 (1957), at 7-20; Mayer, "Race and Private Housing: A Social Problem and a Challenge to Understanding Human Behavior", 13 *Journal of Social Issues*, No. 4 (1957), at 3-6.

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that this petition for writ of certiorari be granted.

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APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO

February 7, 1968

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF COMMON PLEAS FOR LUCAS COUNTY

It is ordered by the Court that this motion is overruled.

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO

February 7, 1968

APPEAL FROM THE COURT OF COMMON PLEAS FOR LUCAS COUNTY

This cause, here on appeal as of right from the Court of Common Pleas for Lucas County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

APPENDIX C

THE SUPREME COURT OF THE STATE OF OHIO

February 7, 1968

MANDATE

TO THE HONORABLE COMMON PLEAS COURT

WITHIN AND FOR THE COUNTY OF LUCAS, OHIO, GREETING:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Appeal dismissed, sua sponte, no substantial constitutional question involved.

APPENDIX D

THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

MEMORANDUM

This cause came on for hearing on November 17, 1967 upon the pleadings, the stipulations of counsel, the agreed statements of fact, upon the oral arguments of counsel, and the exhibits. The appearances were Attorney Clarence G. Smith and George Hopkins, III, on behalf of the contestors. John A. DeVictor appeared on behalf of contestee, City of Toledo, and John Hayward of the Lucas County Prosecutor's Office appeared on behalf of other contestees.

Upon consideration the Court finds that the petition is not well taken as to any of the three causes of action set forth therein. It is therefore ordered and adjudged that the contestors' petition be and hereby is dismissed at the cost of said contestors.

In arriving at this conclusion the Court believes that the case of State ex rel. Snyder v. Board of Elections, et al., 78 Ohio Appeal, 194 is relevant. The syllabi of said case is as follows:

> "Court of Appeals, Lucas County.
> (No. 4161—Decided April 5, 1946.)
>
> Municipal corporation — Ordinances — Referendum powers — Emergency measures — Section 1d, Article II, Constitution.
>
> 1. MUNICIPAL CORPORATIONS 97.
>
> Section 1d of Article II of the Constitution of Ohio applies only to acts of the General Assembly and places no limitation on the referendum powers reserved to the people of a municipality.

Appendix D

2. MUNICIPAL CORPORATIONS 97.

Provisions of a city charter, which provide for a referendum on all ordinances, including one levying a tax passed as an emergency measure, do not violate Section 1d of Article II of the Constitution of Ohio."

It is rather interesting to note that this case also arose in Lucas County. The Court of Appeals in this case stated on page 200 and 201 of its opinion as follows:

"The Supreme Court in opinions and syllabi has pleaded eloquently for a liberal construction of the powers of the people over the measures enacted by legislative authorities. Chief Justice Nichols, at the end of his opinion in the Shryock case*, speaking of the initiative and referendum, said at page 386:

'* * * it is the solemn duty of all courts to keep hands off and to avoid giving to the provisions of the Constitution on that subject a strained construction which, by reason of its very burdensomeness and unreasonableness, would tend to depopularize it.'

The court then went on to state as follows:

"In the very recent case of the State, ex rel. City of Middletown v. City Commission, 140 Ohio St., 368, 24 O.O. 297, 44 N. E. (2d), 459, the Supreme Court said, in paragraph one of the syllabus:

'The provisions of the state Constitution authorizing and providing the manner of submission of municipal ordinances to a refe

* Shryock, a Taxpayer v. the City of Zanesville, et al. 92 O. S., 375.

endum vote should be so construed as to permit rather than preclude the exercise of the right conferred. The object clearly sought to be attained by such provisions should be promoted rather than prevented or obstructed.'

"Looking to the broad—near absolute—powers conferred upon municipalities by Section 3, Article XVIII of the Constitution 'to exercise all powers of local self-government' and safeguarded to the people by referendum as expressed in Section 1f, Article II, 'on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action,' this court can but conclude that the charter provisions expressly reserving to the people of Toledo the right of a referendum vote on this tax ordinance are valid and are not in any way repugnant to the Constitution. To hold otherwise would be 'giving the Constitution a strained construction,' would be obstructing 'the object clearly sought to be attained by such provision' and would be denying to the voters of the city a right which the Constitution expressly gives them in Section 1f of Article II of the Constitution."

The above statements from the decisions of our Supreme Court and Court of Appeals are equally applicable to the facts of the case before this court.

APPENDIX E

Ordinance No. 168-67 of the City of Toledo, enacted March 20, 1967

"WHEREAS, it is the public policy of the United States, the State of Ohio, and the City of Toledo to promote fair treatment and equal opportunity for all persons regardless of race, color, religion or national origin; and

WHEREAS, discrimination against individuals because of race, color, religion, or national origin represents an affront to the dignity of the individuals against whom it is directed, intensifies group conflicts, and is detrimental to the public health, safety and welfare; and

WHEREAS, discrimination in housing adversely affects the continued redevelopment, renewal, growth, and progress of the City of Toledo and its citizens, businesses, industries, and cultural and educational institutions; and

WHEREAS, the Toledo City Charter gives the City of Toledo the right and power to define, prohibit, abate or suppress all things detrimental to the health, morals, comfort, safety, convenience and welfare of the people and to pass such ordinances as are expedient for maintaining and promoting the peace, good government and welfare of the City, and the morals and happiness of its citizens; Now,

THEREFORE,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF TOLEDO:

SECTION 1. That new sections 3-41-15 through 3-41-18.1 be and the same are enacted to read as follows:

Appendix E

SECTION 3-41-15. DEFINITIONS.

As used in this ordinance, unless the context requires otherwise, the following terms shall have the meanings ascribed in this section.

(1) "PERSON SELLING REAL PROPERTY" includes:

(a) A person who sells real property.

(b) A person who leases or rents real property with the exception of owner occupied single or duplex housing units.

(c) A person who acts as agent for another in the performance of any of the above-mentioned functions.

(d) Any corporation, association, partnership, or trusteeship that performs any of the above-mentioned functions.

(2) "Purchaser" includes any occupant, prospective occupant, lessee, prospective lessee, buyer or prospective buyer or person who requests a showing of real property for purposes of sale, rental, lease or occupancy.

(3) "Financial institution" includes any person, partnership, association, or corporation regularly engaged in the business of lending money or guaranteeing loans on real property.

(4) "Discriminate" or "discrimination" includes any distinction or difference in treatment based on the race, color, religion, or national origin of a person.

SECTION 3-41-16. PROHIBITED ACTS.

(1) No person selling real property shall because of race, color, religion, or national origin of any person:

Appendix E

(a) Refuse to sell, lease or rent any real property to a purchaser.

(b) Evict from or deny occupancy to a purchaser of any real property.

(c) Make any distinction, discrimination, or restriction against a purchaser in the sale, rental, lease, occupancy of real property, or in the showing for sale, rental, lease, or occupancy of real property to a purchaser.

(2) No person selling real property shall publish, circulate, issue, or display, or cause to be published, circulated, issued, or displayed any communication, notice, advertisement, or sign of any kind relating to the sale, rental, or leasing of real property which indicates any preference, limitation, specification, or discrimination based on race, color, religion, or national origin.

(3) No financial institution shall discriminate in the granting, withholding, extending, or renewing or in the fixing of the rates, terms, or conditions of any financial assistance sought by an applicant or applicants for the purchase, construction, rehabilitation, repair, or maintenance of any real property or improvements thereon because of the race, color, religion, or national origin of the applicant or applicants or their family.

(4) No person or persons shall conspire with, assist, induce, incite, or coerce another person to commit an act or engage in a practice that violates this section nor engage in economic or other reprisals against a person or business firm for complying with this act.

Appendix E

SECTION 3-41-17. ADMINISTRATION.

(1) In the administration of this ordinance the Board of Community Relations, in addition to any powers heretofore conferred in this Board, shall have the power to:

(a) Formulate a plan of education to advance freedom of choice in housing for all citizens to eliminate housing discrimation based on race, religion, creed, color, national origin or ancestry.

(b) To provide for fact finding hearings to adduce evidence regarding discriminatory housing patterns and practices in the community.

(c) Adopt such reasonable rules and procedures as are necessary to effect the broad purpose of this ordinance.

(2) There is hereby created a Fair Housing Board which shall consist of nine (9) members, all of whom shall be electors of the City of Toledo and who shall be appointed by the Mayor subject to the approval of the Council. Initially the members of such board shall be appointed for the following terms: three (3) members shall be appointed for one (1) year terms, three (3) members shall be appointed for two (2) year terms, and three (3) members shall be appointed for three (3) year terms, each of said terms to commence concurrently. The successor of each such member shall be appointed for a three (3) year terms, except that persons appointed to fill vacancies on said board shall be appointed to serve only for the unexpired term. Appointments to fill vacancies shall be made in the same manner in which original appointments

are made. The Board shall be constituted as of 1967. After being duly constituted a Chairman, Vice-Chairman and Secretary shall be chosen from among the members of the Board by a majority vote. A majority of the Board shall constitute a quorum. The Board may adopt bylaws and establish an executive committee.

(a) The Fair Housing Board shall have the power to:

1. Engage in conciliation efforts.

2. Hold hearings to determine whether any provision of this ordinance has been violated.

3. Compel attendance of witnesses.

4. Administer oaths.

5. Determine facts.

6. Issue such orders as are necessary to enforce the provisions of this ordinance according to Section 3-41-18.

7. Promulgate such rules and regulations for its own governance and procedure as are necessary and proper to execute the purposes of this ordinance.

SECTION 3-41-18. ENFORCEMENT.

(1) Procedure

(a) An aggrieved individual may, by setting forth, the facts in writing under oath or affirmation, file his complaint alleging a violation of Section 3-41-16 with the Board of Community Relations.

(b) The Executive Director of the Board of Community Relations or a member of his staff shall make

a prompt and full investigation of each complaint alleging any practice made unlawful under this ordinance.

(c) The complaint along with the results of the investigation and any records, papers or statements pertaining thereto shall be transmitted to the Fair Housing Board unless the Board of Community Relations can by conciliation promptly eliminate the particular discriminatory practice complained of and, where applicable, receive reasonable assurance from the person complained of of the discontinuance of further discriminatory practices in regard to housing.

(d) The Fair Housing Board, hereinafter referred to as the Housing Board, shall consider the complaint, together with the results of the investigation by the Board of Community Relations and any records, papers or statements pertaining thereto, and make a determination within ten (10) days as to whether or not there appears to be a prima facie case of a violation of the provisions of the ordinance. Within five (5) days of such determination the Housing Board shall in writing inform all interested parties of the results of such determination.

(e) If the Housing Board deems the complaint well-founded on its face it shall at the same time as it provides the foregoing notice serve upon the person charged with engaging or with having engaged in the discriminatory act or practice a statement of the charges made in the complaint, particularly describing the property involved, if any, together with notice of the time and place of a public hearing thereon. The hearing shall be held not less than ten (10) nor more than thirty (30) days after

the service of the statement of charges. The respondent shall have the right to file an answer to the statement of charges, to appear in person at the hearing, to be represented by counsel and to examine and cross-examine witnesses and to present testimony on his own behalf. The case for the complaint shall be presented by a member of the City Law Department. In any hearing, the Housing Board shall not be bound by the rules of evidence prevailing in the courts of law or equity but shall take into account all reliable, probative, and substantial evidence, statistical or otherwise, produced at the hearing, which may tend to prove the existence of a discriminatory act or practice. No person shall be compelled to be a witness against himself at any hearing before the Housing Board.

The complaint shall be a party to the proceeding and any person who is an indispensable party to a complete determination or settlement of a question involved in a proceeding shall be joined. Any person who has or claims an interest in the subject of the hearing and in obtaining or preventing relief against the acts or practices complained of may be, in the discretion of the person or persons conducting the hearing, permitted to appear for the presentation of oral or written argument.

(f) If upon all the reliable, probative, and substantial evidence, the Housing Board finds that the respondent has engaged or is engaging in any unlawful practice, it shall issue such order or orders as the facts warrant and shall state its findings of fact in support thereof. Such order or orders may include:

1. That the respondent forthwith permit the complainant such right or privilege as constituted the subject of the complaint.

2. An order that the respondent perform an affirmative act that would otherwise have been performed had the complainant not been discriminated against because of race, religious creed, color, national origin or ancestry.

3. An order that the respondent cease and desist from the same or similar discriminatory practices which were the subject of the complaint with respect to the same or other property covered by Section 3-41-15.

(g) At any time after the transmittal to the Housing Board of a complaint the Housing Board shall have the authority, with the consent of the respondent, to make findings and issue appropriate orders without the necessity of a public hearing on the complaint.

Unless an appeal be pending, in the event the respondent fails or appears to intend to fail to comply with an order issued by the Housing Board, it shall certify the case, together with the record of its proceedings, including a transcript, and the available evidence of non-compliance to the City Law Department, whose mandatory duty it shall then be to seek compliance by civil action brought in the name of the Fair Housing Board of the City of Toledo before a court of competent jurisdiction; provided that the City Law Department may permit such proceeding to be brought by private counsel of the complainant.

Any party to the proceedings, claiming to be aggrieved by a final order of the Housing Board,

including a determination by the Housing Board that a prima facie case was not established by the complainant, may obtain judicial review thereof by resort to a court of competent jurisdiction in accordance with the provisions of the Ohio Revised Code, Chapter 2506.

(2) Injunction Relief

If at any time after the transmittal of the complaint, it would appear that, prior to the completion of the Housing Board's action on the complaint, the housing which is the subject of the complaint, may be sold, rented or otherwise made unavailable to the complainant may file before a court of competent jurisdiction, an action for a temporary restraining order and a preliminary injunction to preserve the status quo and to prevent irreparable harm pending final action on the complaint.

(3) Misdemeanor

(a) Any person violating any of the provisions of Section 3-41016, shall, upon conviction thereof, be punished by a fine of not more than $500.00 or imprisoned not more than six (6) months, or both. A complaint alleging such a violation may be lodged with the City Law Department without the necessity of resort to any other form of relief provided for by this ordinance.

SECTION 3-41-18.1 SEVERABILITY.

(1) Sections 3-41-15 to 3-41-18, inclusive, and each part of such sections, are hereby declared to be independent sections and parts of sections, and notwithstanding any other evidence of legislative intent it is hereby declared to be the controlling legislative

intent that if any provision of said sections, or the application thereof to any person or circumstance, is held invalid, the remaining sections or parts of sections or parts of sections, and the application of such provision to any person or circumstances, other than those as to which it is held invalid, shall not be affected thereby, and it is hereby declared that this ordinance would have been passed independently of such section, sections or parts of a section so held to be invalid.

SECTION 2. That Section 3-41-15, 3-41-16, 3-41-17 and 3-41-18, as presently written, be and the same are hereby repealed.

Section 3. That this ordinance is hereby declared to be an emergency measure and shall take effect and be in force from and after its passage. The reason for the emergency lies in the fact that this ordinance is necessary for the immediate preservation of the public welfare."

APPENDIX F

OFFICIAL

QUESTIONS AND ISSUES BALLOT

City of Toledo, Lucas County, Ohio

Special Municipal Election
SEPTEMBER 12, 1967

Vote Ballot With an "X"

SAMPLE

Referendum on Ordinance No. 168-67
Passed by the Council of the
City of Toledo, Ohio, March 20, 1967

Providing Against Discrimination, Distinction, or Restriction in the Sale, Purchase, Rental, Leasing or Occupancy of Real Property on Account of Race, Color, Religion, or National Origin, and For the Establishment of a Fair Housing Board.

A Majority Affirmative Vote is Necessary for Passage
VOTE BALLOT WITH AN "X"

Ordinance No. 168-67 "enacting new Sections 3-41-15 through 3-41-18.1 of the Toledo Municipal Code providing against discrimination, distinction, or restriction in the sale, purchase, rental, leasing or occupancy of real property on account of race, color, religion, or national origin, providing for definitions of terms as used in the ordinance, providing for the prohibitions of certain acts, providing for the establishment of a fair housing board and the administration of the provisions of the ordinance, providing for the enforcement of the provisions of the ordinance, providing violation thereof to be a misdemeanor and imposing penalties therefor, providing a severability clause, repealing Sections 3-41-15, 3-41-16, 3-41-17 and 3-41-18 of the Toledo Municipal Code as presently written, and declaring an emergency."

[ ] FOR THE ORDINANCE

[ ] AGAINST THE ORDINANCE

APPENDIX G

Excerpts from The Charter of the City of Toledo, Ohio

SEC. 5. AMENDING CHARTER. Any amendment to this charter may be submitted to the electors of the city for adoption by resolution of the council, two-thirds of the members thereof concurring, and shall be submitted when a petition is filed with the clerk of the council setting forth the proposed amendment and signed by not less than ten per cent of the electors. In either case the proposed amendment shall be voted upon at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after the passage of an ordinance therefor by the council. Otherwise, a special election shall be called and held within the time aforesaid for the consideration of such proposed amendment. It shall be the duty of the clerk to notify the election authorities of the adoption by the council of an ordinance for submission of a proposed amendment, or of his determination that a sufficient petition for submission has been filed with him; and he shall request the election authorities to provide for an election as aforesaid. Not less than thirty days prior to the election, the clerk shall mail a copy of the proposed amendment to the registered electors.

SEC. 43. EMERGENCY MEASURES—LIMITATION—DEFINITION. No ordinance or resolution shall be passed as an emergency measure unless an emergency exists in fact, and a statement of the fact and nature thereof shall be set forth in separate section. An emergency measure is one dealing with the immediate preservation of the public peace, health, safety or property, and an ordinance appropriating money may be passed as an emergency measure. No measure making a grant, renewal, or extension of a franchise, or of a special privilege, or regulating rates to be charged for

service by any public utility, shall ever be declared an emergency measure.

Chapter VI

The Initiative and Referendum

Section 75. Ordinances May be Initiated.

Any proposed ordinance may be submitted to the council by petition filed with the clerk and signed by electors of the city equal in number to twenty per cent of the total number of ballots cast for councilmen at the preceding election.

Section 76. Duty of Council When Peititon Sufficient.

If the certificate of the clerk shows the petition to be sufficient, he shall submit the proposed ordinance to the council at its next regular meeting. The council shall at once proceed to consider the same and shall take final action thereon, within thirty days from the date of the submission thereof. If the council fails to adopt such proposed ordinance it shall be submitted to the vote of the electors in the same manner as for an ordinance upon which a referendum vote is demanded.

Section 77. Proceedings for Referendum When Council Amends.

If the council pass the proposed ordinance with amendment substantially changing its tenor or effect, the ordinance in its original form shall be submitted to a vote as in the case of failure to pass in any form, provided that the proponents thereof secure and cause to be filed with the clerk, within fifteen days after final action by the council, an additional petition for the adoption thereof signed by electors of the city equal in number to at least one per cent of the total number of ballots cast for council-

men at the preceding municipal election; provided that no elector having signed the original petition or for such ordinance shall be eligible to sign the additional petition, and no signatures made or petition paper signed before action by the council on the original petition shall be valid for the additional petition. If the ordinance as originally proposed is adopted by the electors, the amended ordinance as passed by the council shall be without effect, and in any case the operation of such amended ordinance shall be suspended until a referendum is possible to be had.

SECTION 78. ORDINANCE TO REPEAL MAY BE INITIATED.

Proposed ordinances for repealing any existing ordinance in whole or in part may be submitted to the council as provided in the preceding sections for initiating ordinances.

SECTION 79. COMPULSORY REFERENDUM OF CERTAIN MEASURES—FRANCHISES.

No ordinance or resolution for a public improvement requiring or authorizing the expenditure of more than fifteen per cent (15%) of the average gross annual current operating expenditures by the City for the five (5) fiscal years immediately preceding, or for the granting of a general public utility franchise, shall be effective until the same shall be approved by a majority vote of the electors. A general public utility is one in which all the people of the City may have an interest.

(Amended by electors May 5, 1964, Res. 40-64)

SECTION 80. DUTY OF CLERK TO REQUEST ELECTION THEREON.

Within five days after the passage of an ordinance or resolution within the provisions of the preceding section, the clerk of the council shall request the election authorities to call a special election to be held not less than thirty nor more than fifty days after the passage of such ordinance or resolution.

Appendix G

SECTION 81. REFERENDUM ON PETITION.

Every ordinance passed by the council shall be subject to the referendum if at any time within thirty days a petition signed by electors equal in number to at least fifteen per cent of the total number of ballots cast for councilmen at the preceding municipal election be filed with the clerk, requesting that such ordinance be submitted to the people for consideration.

SECTION 82. BALLOTS ON REFERENDUM.

The ballots used in voting upon any measure submitted to the electors for approval shall contain the title and subject thereof, which may be stated in the title, and underneath the two propositions, "For the ordinance (resolution or amendment)" and "Against the ordinance (resolution or amendment)." Immediately at the left of each proposition there shall be a square in which by making a cross (X) the voter may vote for or against the proposition. (As amended Nov. 4, 1919.)

SECTION 83. SPECIAL REFERENDUM ELECTIONS.

The ordinance on which a referendum vote is demanded by petition shall be submitted at a special election held not later than thirty days after the clerk has certified to the election authorities that the petition for submission is in accordance with the requirements of this charter; but if a regular election is to be held within six months, such ordinance shall be submitted at the regular election, unless the council directs that an earlier and special election be held.

SEC. 84. EFFECT OF APPROVING VOTE. If a majority of the votes cast be in favor of a measure submitted to referendum the same shall thereupon become adopted as if it had been passed by council; or in case of an amendment to the charter, it shall become of full force as a part thereof.

Appendix G

SEC. 85. EMERGENCY MEASURES SUBJECT TO REFERENDUM. An emergency measure shall be subject to referendum as other ordinances or resolutions. If, upon a referendum, it be not approved, it shall stand repealed, but any expense incurred in accordance with the provisions thereof and before the disapproval by referendum shall be paid under the authority thereof as if the measure were still effective. Until repealed upon referendum it shall continue effective.

SEC. 86. POWER OF THE COUNCIL TO AMEND OR REPEAL. After the people have legislated for themselves, either by initiating legislation or passing favorably or unfavorably upon legislation referred to them by any body, their action is final and shall not be subject to amendment or repeal, without a general vote of the people of Toledo on same (As Amended Nov. 2, 1915).

(Sections 87, 88, 89, 90, 91 repealed).

SEC. 92. REQUIREMENTS OF PETITION. A petition to initiate an ordinance, or for a referendum of an ordinance or resolution, or of an amendment to this charter, need not be made on one paper, but may be the aggregate of two or more petition papers. Each signer of a petition paper shall sign his name in ink or indelible pencil and shall place thereon, after his name, his place of residence by street and number. To each paper there shall be attached an affidavit by the circulator thereof stating the number of signers thereto and that each signature thereon is the genuine signature of the person whose name it purports to be, and that it was made in the presence of the affiant.

SEC. 93. UNIFORMITY OF PETITION PAPERS. Petition papers circulated with respect to any proposition shall be uniform in character and form. The clerk shall determine and keep on file forms of blanks to be used in the several

instances of petition, and all petition papers shall conform to such forms, respectively.

SEC. 94. WHAT THE PETITION SHALL SHOW. If the petition is to initiate an ordinance, or to refer an ordinance or resolution, or for an amendment to this charter, each petition paper shall set forth the proposed measure in full. Every petition, whether for initiating an ordinance or other purpose, shall bear the names of five electors whose names shall appear on each petition paper, and who shall thereon be designated as the proponents of the proposition of the petition, and who shall be recognized as the committee in charge thereof.

SEC. 95. CLERK TO DETERMINE SUFFICIENCY OF PETITION. The clerk shall determine the sufficiency of a petition within ten days after the same is filed with him, and endorse his certificate thereon. When supplemental petition papers are filed, as herein provided, the clerk shall determine the sufficiency of the petition as supplemented within ten days and endorse thereon his finding.

SEC. 96. SUPPLEMENTING CERTAIN INSUFFICIENT PETITIONS. If the clerk certifies that a petition to initiate an ordinance, or to amend this charter, is insufficiently signed, the same may be supplemented by the filing with the clerk within fifteen days, of an additional petition paper or papers, prepared, signed and authenticated as in the case of the original petition.

SEC. 97. EFFECT OF CLERK'S DECISION. The final decision of the clerk that a petition is insufficient shall not prejudice the filing of a new position for the same purpose. The finding of the clerk as to the sufficiency of a petition shall be a final order.

Appendix G

SEC. 98. DUTY OF CLERK WHEN PETITION SUFFICIENT. After the clerk determines that a petition is sufficient, he shall certify the fact to the council, and, if the petition requires an election, also to the election authorities, of whom he shall request that provision for an election be made.

SEC. 99. NOTICE OF ELECTION. In case of a referendum election, the clerk, not less than twenty days before the date thereof, and on the tenth day before said date, shall cause to be published in the City Journal, a notice of such election. The notice shall set forth a true copy of the measure as given in the petition or resolution.

SEC. 100. PUBLICATION OF INITIATED ORDINANCES. Initiated ordinances, if passed by the council, shall be published as in case of measures originating in the council. Ordinances or resolutions, or amendments to this charter, adopted upon a referendum need not be subsequently published, but a statement that they are effective as a result of the referendum, giving the full title of each approved, shall be made in the City Journal.

(END CHAPTER VI)

SUPREME COURT, U. S.

FILED

JUN 19 1968

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 77

JOHN HOLLAND, *et al.*,

Petitioners,

v.

THE LUCAS COUNTY BOARD OF ELECTIONS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT CITY OF TOLEDO, OHIO IN OPPOSITION.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5547

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1409.

JOHN HOLLAND, *et al.*,

Petitioners,

v.

THE LUCAS COUNTY BOARD OF ELECTIONS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT CITY OF TOLEDO, OHIO IN OPPOSITION.

INTRODUCTION.

The petitioners filed their Petition in Contest of Election pursuant to Section 3515.08 of the Ohio Revised Code in the Common Pleas Court of Lucas County, Ohio. The presiding judge found that said petition was not well taken as to any of the three causes of action set forth therein and said petition was dismissed. The judge filed a written memorandum in support of his decision. Under authority of Section 3515.15 of the Ohio Revised Code, the petitioners appealed the decision directly to the Supreme Court of Ohio, which on February 7, 1968, denied the petitioners' motion for leave to appeal, dismissed the appeal for the reason that no substantial constitutional question existed and ordered execution of the lower court judgment. Whereupon petitioners brought their cause here.

STATEMENT OF FACTS.

The Agreed Statement of Facts admitted into evidence at the trial of this matter is as follows:

The City of Toledo, in northwestern Ohio, has a population of 318,003 as of 1960 Federal census and as of April 1, 1967, an estimated 394,500. It has been a charter city since January 1, 1916.

On March 20, 1967, the nine members of City Council passed Open Occupancy Ordinance No. 168-67 as an emergency measure. Three days later a Petition for a Referendum was checked at the Clerk's Office of City Council, approved as to form and on April 18, 1967 some 792 Referendum Petitions were filed containing approximately 30,327 signatures; 17,466 were verified by the clerk and forwarded to the Lucas County Board of Elections on April 19, 1967.

On May 1, 1967, the Board established the date of September 12, 1967, which was the date for a primary election, for a vote and announced the official returns September 18, 1967 and certified to the Secretary of State that 54,518 voted for repeal and 22,827 voted to retain the ordinance.

Ten days thereafter the 29 contestors filed their Petition in Contest of Election. The City of Toledo filed its Answer followed by petitioners' Reply with Consent of Court.

The following facts are admitted by the pleadings and by stipulations of the parties:

> That the Lucas County Board of Elections is a duly constituted authority of Ohio, whose duties are prescribed by law and that it so functioned as such on September 12, 1967 and prior thereto,
>
> That the City of Toledo was chartered under

authority of Article XVIII, Section 3 of the Ohio Constitution;

That Ted W. Brown as Secretary of State was required to give statutory notice of the results of the vote on the Petition For Referendum as certified to him by the Lucas County Board of Elections;

That twenty-six of the contestors are electors and citizens of Ohio and residents of Toledo, Ohio, and that they voted at the election of September 12, 1967 and cast their vote as to the issue on the ballot—Referendum on Open Occupancy;

That they furnished surety bond set by the Clerk of the Court of Common Pleas of Lucas County, Ohio, and likewise made an additional deposit for court costs;

Under its First Cause of Action it was admitted by the pleadings and stipulation of the parties that except for power reserve to the people, by the initiative and referendum, all other legislative power was vested in the City Council;

Ordinance No. 168-67 was passed as an emergency measure which became effective upon its passage by virtue of Charter Section 43;

The ordinance set forth in Contestors Petition on pages 5 through 10 is Ordinance No. 168-67 as passed by City Council. (See Appendix "E" of Petition for Writ of Certiorari.)

There is as recited in O. R. C. 4112.02, as of October 30, 1965, a housing law entitled "Unlawful Discriminatory Practises" containing certain provisions similar to Ordinance No. 168-67.

Section 81 of the City of Toledo Charter reads as follows:

"SECTION 81. Referendum on Petition.

"Every ordinance passed by the council shall be subject to the referendum if at any time within thirty days a petition signed by electors equal in number to at least fifteen per cent of the total number of ballots cast for councilmen at the preceding municipal election be filed with the clerk, requesting that such ordinance be submitted to the people for consideration."

That the contestors knew for over four months that said election was to be held for the purpose as stated and did nothing to attack its validity or to stop it. That the City of Toledo and the Lucas County Board of Elections proceeded to place said referendum on the ballot and made all other necessary arrangements for the election to be held.

REASONS WHY THIS WRIT SHOULD NOT BE GRANTED.

1. BY STARTING THIS ACTION UNDER SECTION 3515.08 OF THE OHIO REVISED CODE, PETITIONERS ADMIT THAT THE REFERENDUM ELECTION WAS LAWFUL.

Section 3515.08. Contest of election, reads as follows:

§ 3515.08. Contest of election.

The nomination or election of any person to any public office or party position or the approval or rejection of any issue or question, submitted to the voters, may be contested by qualified electors of the state or a political subdivision.

In the case of an office to be filled or an issue to be determined by the voters of the entire state, or for the offices of members of congress, or for judicial offices higher than that of court of common pleas, or for an office to be filled or an issue to be determined by the voters of a district larger than a county, said contest shall be heard and determined by the chief

justice of the supreme court or a justice of the supreme court assigned for that purpose by the chief justice; except that in a contest for the office of chief justice of the supreme court, such contest shall be heard by a justice of such court designated by the governor.

In the case of all other offices or issues, except judicial offices, such contests shall be heard and determined by a judge of the court of common pleas of the county in which the contest arose. In the case of a contest for a judicial office within a county, such contest shall be heard by the court of appeals of the district in which such county is located. If any contestant alleges prejudice on the part of the judges of the court of appeals or the court of common pleas, assigned to hear such appeal, then the chief justice of the supreme court, upon application of any such contestants and for good cause shown, may assign judges from another court to hear such contest.

Section 3515.14. Judgment of Court, reads as follows:

§ 3515.14. Judgment of Court.

Upon completion of the trial of the contest of election, the court shall pronounce judgment as to which candidate was nominated or elected or whether the issue was approved or rejected by the voters.

* * * * *

It can readily be seen from the statement of facts that there were no errors, frauds or mistakes in the election in evidence in this case. In *Cooper v. Kosling*, 154 O. State 207, the court held that the petition failed to state a cause of action for Contest of Election which does not allege that contestee did not receive the largest number of votes or that there was error, fraud or mistake in the tabulation of the votes cast. It is also stated in 19 *O. Jur.* 2d, p. 157 as follows:

"However, it has been said that a contest proceeding was not applicable and not appropriate in a case when the validity of an election was challenged on the ground that there was no legal authority for holding it, * * *."

In view of the above, and especially in view of the fact that the only judgment the court could grant was to state whether the issue was approved or rejected by the voters, the petitioners by bringing this action under Section 3515.08 of the Ohio Revised Code admit that the election was held under lawful authority and that the election itself was lawful.

2. PETITIONERS BASED THEIR WHOLE CASE ON THE PREMISE THAT THE CHARTER OF THE CITY OF TOLEDO NOW REQUIRES THE APPROVAL OF THE MAJORITY OF THE ELECTORATE BEFORE FUTURE FAIR HOUSING LAWS MAY BE ENACTED, WHICH IS MERELY THEIR CONCLUSION AND NOT BINDING UPON THE COURT.

A. Council of the City of Toledo can still pass a Fair Housing Ordinance.

Section 86 of the City of Toledo Charter reads as follows:

"Sec. 86. Power of the Council to Amend or Repeal.

After the people have legislated for themselves, either by initiating legislation or passing favorably or unfavorably upon legislation referred to them by any body, their action is final and shall not be subject to amendment or repeal, without a general vote of the people of Toledo on same."

It is to be noted that the section specifically uses the words amendment or repeal, but does not contain such words as re-enact or reconsider. It is felt this is important,

as before you can amend or repeal something it must be in existence. Thus, in the case at hand if the referendum had been in favor of the ordinance, the City Council would not have the power to amend or repeal the ordinance without a general vote of the people. However, it does not necessarily follow that Council of the City of Toledo cannot reconsider other ordinances dealing with the subject of fair housing.

As stated in 37 *American Jurisprudence*, at page 854, the general rule is that an ordinance which has been repealed by the municipal council upon the filing of a referendum petition in respect thereto may not be re-enacted in substantially the same form, as this would enable the council to defeat the power of referendum. This rule, however, does not prevent the municipal council from further dealing with the subject matter of the ordinance by enacting another, essentially different, ordinance.

It is assumed by the petitioners that the reason the ordinance on fair housing was voted down was due to the fact that the voters did not want a fair housing law in Toledo. There is no possible way to know why the voters turned down the particular ordinance presented to them. It could just as easily be assumed that the reason it was turned down was that it was not strong enough.

It can thus be seen that petitioners' whole case is based on a premise that is merely their own conclusion and one on which there was no evidence of any kind at the time of trial.

B. Constitutional question not properly before the Court at this time.

The courts are not empowered to give advisory opinions as to the constitutional validity of laws as applied to possible future eventualities. It is a general rule of law

that the judiciary has no authority to pronounce an opinion, a judgment or a decree upon a mere moot question as to whether a proposed law will conflict with the Constitution if it should be enacted by the General Assembly, or be adopted by the people. Likewise, the Supreme Court of Ohio will not decide constitutional questions until the necessity for such decision arises and it will dismiss for want of jurisdiction a case sought to be reviewed on the theory that it involves a constitutional question where the record does not show that the disposition of the case requires the consideration of a constitutional question. These principles of law are well established in Ohio with citations too numerous to list.

It is further stated in *American Jurisprudence* 2d, "Constitutional Law," Section 112 at pages 299-300 as follows:

> § 112. Refusal to decide abstract, hypothetical, or moot constitutional questions.
>
> The constitutionality of a statute will not be considered and determined by the courts as a hypothetical question, because constitutional questions are not to be dealt with abstractly or in the manner of an academic discussion. Similarly, the courts frequently state that they will not anticipate constitutional issues, and thus the Supreme Court of the United States has declared that it will not assume in advance that a state will so construe its law as to bring it into conflict with the Federal Constitution or an act of Congress. In this connection, it has been said that the principle that the United States Supreme Court will not anticipate a question of constitutional law in advance of the necessity of deciding it carries special weight in maintaining proper harmony in federal-state relations, and consequently must not yield to the claim of the relatively minor inconvenience of postponement of decision.

Some Ohio cases on this issue with which the Supreme Court of the United States has been involved are as follows:

Belden v. Union Central Life Insurance, 323 U. S. 674, wherein it was held that constitutional questions will not be decided until the necessity for a decision arises on the record before the court.

Allied Stores of Ohio, Inc. v. Bowers, 166 O. State 116, affirmed 358 U. S. 522, wherein the court held that ordinarily constitutional questions will not be considered unless consideration is necessary to decision of the case before the court.

Hodge Drive-It-Yourself Co. v. The City of Cincinnati, 284 U. S. 335, wherein the court stated that the claim of denial of equal protection cannot be supported by mere speculation or conjecture.

Applying the above rules to the facts of our case at hand it can readily be seen that the facts of this case do not properly bring the constitutional question before the court. At this time, there is no way of knowing what will happen if the Council of the City of Toledo passes another fair housing law. There is no way of knowing if the Council of the City of Toledo would even consider passing another fair housing law. It is readily apparent that petitioners, therefore, base their whole case on speculation and conjecture.

As stated previously, their case is also based on their interpretation of Section 86 of the Charter of the City of Toledo, Ohio. As pointed out previously, this Section is subject to several interpretations.

Accordingly, it is a universally applied principle in considering constitutional questions that an act will be so construed, if possible, so as to sustain its constitutionality and to avoid conflict with the provisions of the State and

Federal Constitutions, even though such construction is not the most obvious or natural one.

It is further well established in the State of Ohio and elsewhere that where the validity of an act is assailed and there are two possible interpretations, one of which would render it valid, and the other invalid, the court should adopt the former, so as to bring the act into harmony with the constitution.

In closing, it should be pointed out that the cases of *Reitman v. Mulkey,* 387 U. S. 369, and *The State Ex Rel. Hunter v. Erickson Mayor, et al.,* ____ U. S. ____ (unreported), which case this Court has recently agreed to hear on the merits, and similar cases, do not apply to the situation at hand as there were no restrictions contained in either the referendum or the ordinance repealed calling for a specific procedure to follow in order to enact new fair housing laws.

CONCLUSION.

For the reasons hereinabove stated, it is respectfully requested that the Petition For Writ of Certiorari be denied and that the decisions of the lower Courts be affirmed.

Respectfully submitted,

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